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In the Supreme Court

of the

United States

OCTOBER TERM, 1968

No. [redacted] 350

AGNES L. HAINES, as surviving spouse and personal representative of DONALD J. HAINES, deceased,

Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

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No. .....

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Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

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Petitioner, AGNES L. HAINES, prays that a Writ of Certiorari issue to review the denial by the Arizona Supreme Court of Petitioner's Petition for Review of the judgment of the Arizona Court of Appeals.

REPORTS OF OPINIONS

The opinion of the Arizona Court of Appeals is reported at 7 Ariz.App. 65 and 436 P.2d 159. The Supreme Court's denial of the Petition for Review is not reported. The

opinion of the Court of Appeals and the denial by the Arizona Supreme Court of the Petition for Review are set forth in Appendix "B" and Appendix "D," respectively.

JURISDICTION

The Judgment of the Arizona Court of Appeals, the intermediate appellate court in the State of Arizona, was entered on January 17, 1968, and the Petition for Rehearing was denied on March 21, 1968. The Supreme Court of Arizona denied the Petition for Review on April 30, 1968. Under relevant Arizona law the Judgment became final as a matter of State law upon the Supreme Court's denial of the Petition for Review. The jurisdiction in this Court is invoked under 62 Stat. 929, 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Sections 1 and 2 of the Federal Employer's Liability Act,[1] adopted in 1908, provide that employers under the Act shall be responsible for injuries "resulting in whole or in part from the negligence of" the employer. This Court held in *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500 (1957) that Congress intended by this Section to make the employer responsible where his negligence was the simple cause of injury to his employees, thus relieving the injured employee of the more exacting proof of proximate causation. The principal question presented in this case is whether Congress intended in Section 3 of the Federal Employer's Liability Act—which does not contain the qualifying lan-

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1. Section 1 deals with the liability of common carriers for negligent injuries to their employees while "engaging in commerce between any of the several States or Territories. . . ." Section 2 contains similar provisions pertaining to common carriers in "the Territory, the District of Columbia, the Panama Canal Zone, or other possessions of the United States. . . ."

guage "in whole or in part"—to make simple causation rather than proximate causation the standard applicable to the plaintiff's negligence.

2. Whether there was sufficient evidence upon which to charge the jury on the issue of decedant's negligence and the legal effects of such negligence.

3. Whether it was error to admit into evidence in this case a railroad safety rule.

STATUTES INVOLVED

The statutory provisions involved are Sections 1-5 of the Federal Employers' Liability Act, 45 U.S.C. sections 51-55. The relevant sections are appended to this Brief as Appendix "G".

STATEMENT OF THE CASE

This is a wrongful death action commenced pursuant to the Federal Employers' Liability Act (35 Stat. 65, as amended, 45 U.S.C. sec. 51 *et seq.*) for the death of a railroad employee, killed in the line of his duties as a conductor for a railroad engaged in interstate commerce as a common carrier.

Petitioner is the widow of the deceased railroad employee, Donald J. Haines. The decedent met his death on the night of November 12, 1964, as the result of the derailment of a Southern Pacific Company freight train near Bowie, Arizona. Mr. Haines was the conductor on this train and at the time of the derailment was acting in the course and scope of his employment with the Southern Pacific Company. This employee had 36 years of service with the railroad and was 56 years old when he was killed.

The derailment occurred on account of a failed rail. The circumstances why this rail failed and the conflicting testimony of experts on this phase of the case are eliminated

from this Petition as immaterial. Suffice it to say that the train involved was 89 cars long and that the last 12 cars including the caboose were derailed by the failed rail.

At the time of the accident Mr. Haines was in the caboose, the last car on the train. He was talking on the radio-telephone to a conductor on another train who was seeking train traffic information. Mr. Haines' train was traveling 60 miles per hour in rural country on straight (tangent) track. The derailment caused the train to come to an inordinately fast stop, which in some unknown fashion caused Mr. Haines to end up at the head end of the caboose where he apparently struck his head and was killed instantly or nearly so. It was stipulated that he was killed as a result of the derailment.

The exact position of Mr. Haines in the caboose at the time of the derailment is open to question, since no one saw him. It is not known whether he was seated or standing. If he was standing, it is not known whether or not he was holding an overhead grab iron or, if not, whether he was prepared to do so instantly. The two other employees riding with Mr. Haines, Hannah and Upshaw, had their backs to him, although they heard him talking on the radio. His body was found in the front of the caboose after the train came to a stop and the other caboose passengers turned on the light and became oriented as to what had happened.

Because of the construction of the caboose and the location of the radio-telephone, it would have been necessary for Mr. Haines to get out of the seat he was occupying to reach the telephone receiver in order to relay the information requested by the other conductor.

At the trial of the case, the Court admitted in evidence, over Petitioner's objection, defendant's Safety Rule No. 2044 (R.T. 111-114). The portion of the Safety Rule admitted is as follows:

> "At all times when riding moving equipment, employees must be prepared for sudden or unexpected

starting, stopping, lurch or jerk of engine, car, or train by maintaining firm hand and foothold, by being braced and holding, or prepared to do so instantly, moving about only when necessary for the performance of duties."

The trial court refused to permit the plaintiff to show that the foregoing safety rule was customarily violated. (R. T. 108-109).

At the close of all the evidence, the Court instructed the jury upon the definition of proximate cause, decedent's negligence, sole proximate cause, contributory negligence, and reduction of plaintiff's award. The instructions are set forth in full as Appendix "F".

Petitioner objected to Respondent's Requested Instructions 6, 7, 8, 9, and 10 on the ground that there was not sufficient evidence of contributory negligence to submit the issue to the jury (R.T. 479), and on the ground that under the Federal Employers' Liability Act, a plaintiff's award can be reduced only by that negligence of the decendent which was a proximate cause of the death and not that negligence which might merely be the simple cause (R.T. 409, 480).

The trial court in Arizona, the Superior Court, indicated that it understood and rejected Petitioner's contentions and overruled the objections (R.T. 402-3).

Petitioner appealed the judgment of the Superior Court to the Arizona Court of Appeals, which affirmed the judgment. Petitioner moved for rehearing of the appeal, one ground of which was that the opinion of the Court of Appeals misstated the facts. The Court of Appeals had adopted defendant-appellee's Statement of Facts, including contentions unsupported by the record. The Motion for Rehearing was denied, and the Supreme Court of Arizona denied plaintiff-appellant's Petition for Review. This Petition followed.

REASONS FOR GRANTING THE WRIT

The principal issue in this case—whether the causation standard applicable to employee negligence in Federal Employers' Liability Act cases is the common law proximate cause, or simple cause such as is applicable to the defendant's negligence under the Act—is of central importance to the rights of plaintiffs under an important Federal statute. It is a recurring problem upon which there is a conflict of authority between, on the one hand, the Texas Court of Civil Appeals, and, on the other, the Fifth and Sixth Circuit Courts of Appeals and the Supreme Court of Oregon.[2]

The defendant's requested Instructions Nos. 6 and 7, both of which were given by the trial court, and to both of which the plaintiff objected are as follows:

DEFENDANT'S REQUESTED INSTRUCTION NO. 6

It was the continuing duty of the deceased to exercise ordinary care for his own safety. If he failed in

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2. *Missouri-Kansas-Texas R.R. v. Shelton*, 383 S.W. 2d 842 (Tex.Civ.App. 1964) cert. denied, 382 U.S. 845 (1965); *Page v. St. Louis, S.W. Ry.*, 349 F.2d 820 (5th Cir. 1965); *Ganotis v. New York Cent. R.R.*, 342 F.2d 767 (6th Cir. 1965); *Caplinger v. Northern Pacific Terminal*, 418 P.2d 34 (Ore. 1966).

The Fifth Circuit Court of Appeals in the *Page* case acknowledged the conflict:

> Attesting again to the marvels of an advocative system which, grinding out the thousands of FELA cases in State and Federal appellate courts, nevertheless after a half century's experience under the Act still leaves new questions, this problem is very, very fresh, the materials of decision are scarce, and the score now stands 1 to 1. Texas upholds the Employee's contention, the Sixth Circuit, that asserted here by the Railroad.
>
> 349 F.2d at 823.

Actually, the score is 3 to 2: the Fifth and the Sixth Circuits and the Supreme Court of Oregon on one side and the language of the Act and the Texas Court of Civil Appeals on the other.

such duty, he himself was negligent. If his negligence was the sole proximate cause of his injury, then the plaintiff may not recover.

If his conduct amounted to contributory negligence as to the death, and if you should find that the defendant is liable for the death, then in fixing the damages to be awarded the plaintiff, a proportionate reduction must be made because of such contributory negligence in accordance with these instructions.

DEFENDANT'S
REQUESTED INSTRUCTION NO. 7

A person is guilty of contributory negligence if he himself is negligent, and his negligence concurring with the negligence of another or of others, contributes in any degree, no matter how small, in proximately causing the death.

The plaintiff made specific objection to Instruction No. 7 on the ground that the causation standard applicable to plaintiffs under the Federal Employers' Liability Act was not the same as the standard for defendant's negligence. The error in the lower court's overruling this objection can be best appreciated against the background of a brief history of the Federal Employers' Liability Act, and the history of litigation in this Court relating to pertinent causation standards.

Under the Federal Employers' Liability Act, an employer is liable for an employee's injury if the employer was negligent, if the negligence was the simple cause of the accident, and if the plaintiff was damaged. The FELA abolishes the defenses of assumption of risk (45 U.S.C. Sec. 54) and contributory negligence (45 U.S.C. Sec. 53). In place of contributory negligence, Section 3 of the Act provides that the plaintiff's award shall be reduced by the amount of negligence attributable to the injured employee. (45 U.S.C. Sec. 53)

There was some confusion in the early cases concerning the causation standard applicable to employer negligence. Compare *New York Cent. R.R. v. Ambrose*, 280 U.S. 486 (1930) with *Schulz v. Pennsylvania R.R.*, 350 U.S. 523 (1956); *Ellis v. Union Pack R.R.* 329 U.S. 649 (1937); and *Wilkerson v. McCarthy*, 336 U.S. 53 (1949). However, whatever ambiguity may have existed prior to 1957, this Court held in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. (1957) that simple causation is the legal cause test for the employer's primary negligence.

Since the *Rogers* decision there has been a division among the lower courts as to whether proximate causation or simple causation is the appropriate standard for employee negligence. Two Circuit Courts of Appeals, the Fifth, *Page v. St. Louis, S.W. Ry.*, 349 F.2d 820 (5th Cir. 1965) and the Sixth, *Ganotis v. New York Cent. R.R.*, 342 F.2d 767 (6th Cir. 1965) have ruled that the Act requires simple causation for both employer and employee negligence. *Caplinger v. Northern Pacific Terminal*, 418 P.2d 34 (Ore. 1966) merely follows the Fifth Circuit. The Texas Court of Appeals in *Missouri-Kansas-Texas R.R. v. Shelton*, 383 S.W. 2d 842 (Tex.Civ.App. 1964) cert. denied, 382 U.S. 845 (1965) has reached a contra conclusion.

The reasoning of the Fifth Circuit Court of Appeals' opinion in the *Page* case is that a single standard is simple in application, and easier for the jury to understand. While we disagree with this conclusion, its chief defect is its irrelevance. The pertinent issue is congressional intent. The holding of the Court in *Rogers* was bottomed upon two considerations: (1) the language of Sections 1 and 2, making employers liable for damages "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . .," and (2) the general congres-

sional intent to expand the employee's right of recovery under the Act. In the language of the Court:

> "The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to its negligence. (Emphasis in the Court's opinion.)
>
> "The law was enacted because Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common-law defenses and for all practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit." 352 U.S. at 507-8.

Both of the foregoing considerations—specific qualifying language in Sections 1 and 2, and intent to benefit employees—militate in favor of the proximate cause standard as applied to employees. Section 3, unlike Sections 1 and 2, is not limited by the "in whole or in part" language which the Court found significant in *Rogers*. And it is hardly likely that Congress, in enacting a statute whose basic objective was to facilitate employee recover, would have imposed upon employees a causation test more onerous to the employee than the common law test. Congress should not be taken to have so intended, in the absence of particularized language in Section 3 such as appears in Sections 1 and 2.

Finally, as the Texas Court of Civil Appeals observed in *Missouri-Kansas-Texas R.R. Co. v. Shelton*, 333 S.W.2d 842 (1964), where there is no evidence of intent to alter the common law, as there was in the primary negligence context, the common law must be held to continue to apply.

It cannot be disputed that the question of the proper causation standard for employee negligence under the FELA is an important question. The divergence of opinion among the lower courts heightens the necessity of a resolution of this issue by this Court.

Corollaries of the rule adopted by the lower court that simple cause is the legal test for employee negligence are also found in other instructions. Instruction No. 8 instructed the jury to "Determine the total amount of damages to which the plaintiff would be entitled under the Court's instructions if decedent had not been guilty of contributory negligence." Upon analysis, the error in this instruction is inextricably interrelated with the error as to causation, and the one follows logically from the other.

In every case of contributory negligence on the part of the decedent, even where a jury might find that decedent's contribution was but one per cent, the jury would have to find that the injury or death would not have occurred were it not for that contribution.

But the test is not whether an injury would have occurred or to what extent it would have occurred in the absence of contributory negligence; rather, the jury should be instructed to determine how much of the injury was *caused* by the employee's negligence and then reduce the award by that percentage. The difference is devastating. Notwithstanding the fact that the death *would not have occurred absent the negligence of decedent,* the jury should assign a percentage to decedent's contribution.

The Arizona Court of Appeals erred in ruling that the causation issue is not presented by the instant case. The Court of Appeals ruled that in light of the jury's verdict for

the defendant, the jury must have either found that the defendant was not negligent or that the plaintiff's negligence was the sole proximate cause of the plaintiff's damages, and that "if any error in the instructions on contributory negligence, as to a single or double standard as argued by the plaintiff, existed it could only be harmless error in light of the jury's verdict for the defendant." 436 P.2d at 166.

The argument is fallacious, since the error in instructions as to the causation standard and the instructions on reduction of the award may very well have constituted the reason for the defense verdict.

The jury may have decided that defendant was negligent and that defendant's negligence was the simple cause of the death. However, the jury may have then decided that decedent's conduct caused his death in whole or in part. In reducing the award the jury must have considered the question raised by Instruction Nos. 8, 9 and 10 i.e., "Determine the total amount of damages to which the plaintiff would be entitled under the Court's instructions if decedent had not been guilty of contributory negligence." The jury probably concluded that had decedent not been guilty of contributory negligence there would have been no death at all and damages in the absence of contributory negligence would therefore be zero.

Defendant argued to the jury, "I think that you have to review all of the evidence and I think you will find this accident would not have occurred, nor would Mr. Haines have been injured or died had he taken only the slightest precaution for himself, . . ." (R.T. 445).

The harmless error argument is based upon the premise that under the FELA plaintiff's award is merely reduced by contributory negligence. However, the argument is unsound

because in this instance the jury was instructed to decide what damage would have been done in the absence of contributory negligence; the jury was compelled to find such hypothetical damage to be zero.

SUFFICIENCY OF EVIDENCE OF PETITIONER'S NEGLIGENCE

In the absence of any evidence whatever of negligence on the part of Conductor Haines, the trial court instructed the jury on the effects of contributory negligence and reduction of plaintiff's award. In addition to raising important questions of Federal law, the error is in conflict with prior decisions of this Court.

The sum total of all evidence of contributory negligence is as follows:

1. Conductor Haines stood to answer the radio-telephone.

2. It is unknown whether he was then seated, whether he remained standing and, if so, whether or not he held the overhead grab iron or was immediately prepared to do so.

3. Two to three minutes after he first answered the radio telephone a derailment occurred.

4. After the derailment, Hannah and Upshaw, who were in totally different positions in the caboose, were uninjured.

5. Conductor Haines was found dead at the front end of the caboose.

The foregoing is *all* of the evidence of contributory negligence. The opinion of the Arizona Court of Appeals cites additional purported facts, but these assertions of additional purported facts were simply borrowed verbatim from the Appellee's Brief, and are without any support in the record.

The additional purported facts referred to in the Court of Appeals opinion are as follows:

1. "The conductor's chair on the North side of the caboose immediately behind the north bay window was not occupied." 436 P.2d at 162, opinion page 3 (Appendix "B").

2. "However, the decedent chose to stand in the aisle two or three minutes during the conversation and while viewing the north leg of the Y." 436 P.2d at 162, opinion, page 3.

There is no support in the record for either of these statements. Neither is a statement of fact; both are conclusions which under applicable decisions of this Court are impermissible.

The entire basis for submission to the jury of the contributory negligence issue was an attempted inference from the conductor's death that he must not have been seated and that he must not have been holding the overhead grab iron.

> "There is no direct evidence whether the decedent was standing at the time of the derailment or whether he was securing himself by grasping the overhead grab-iron while standing in the aisle." 436 P.2d at 162, opinion page 3.
>
> "Now no one testified as to whether he was exactly, whether he had hold of anything or not. That is true. The testimony was that he was standing in the middle of the aisle. That is all the testimony." (From defendant's closing argument R.T. 446).

Besides allowing the jury to speculate on Conductor Haines' conduct, submission of the issue to the jury is in conflict with two decisions of this Court, *Jesionowski v. Boston & M. R. Co.*, 329 U.S. 452 (1947) and *Tillar v. Atlantic Coastline R. Co.*, 318 U.S. 54 (1943).

The opinion in *Jesionowski* observes that "Derailments are extraordinary, not usual, happenings." 329 U.S. at 458. It follows that no person can be held to have a duty to anticipate a derailment. Therefore, the contributory negli-

gence issue should not have been submitted to the jury, in light of *Jesionowski*. Conductor Haines' alleged contributory negligence is predicated upon his failure to protect himself against the consequences of a derailment. Not having any such duty, he cannot as a matter of law be contributorily negligent.

In the absence of a common law duty, the trial court, over plaintiff's objection, admitted into evidence the railroad's safety rule no. 2044.

> "At all times when riding moving equipment employees must be prepared for sudden or unexpected starting, stopping, lurch or jerk of engine, car, or train by maintaining firm hand and foothold, by being braced and holding, or prepared to do so instantly, moving about only when necessary for the performance of duties."

The trial court compounded the error by refusing to allow plaintiff to prove that the rule was customarily violated. (R.T. 108, 109) In the absence of evidence of violation of the rule, admission of the rule in evidence is equivalent to submission of the issue of assumption of risk.

In *Tillar*, this Court held that assumption of risk has been obliterated by the FELA in every form including the guise of contributory negligence and "no duty" on the part of the employer.

If Conductor Haines could have violated the rule by virtue of nothing more than his death, then in every instance where an employee who is killed in this manner, he would be guilty of contributory negligence for his violation of the safety rule. Adherence to the safety rule being a condition of employment, the lower court simply introduced into the case the doctrine of assumption of risk under the guise of contributory negligence.

CONCLUSION

For some fifty (50) years after the adoption of the Federal Employers' Liability Act it was not clear whether the legal cause standard applicable to employers' primary negligence in FELA cases was common law proximate causation or simple causation. Confusion in this area was resolved by this Court's decision in *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500 (1957). Of no lesser importance to the administration of the FELA by lower state and Federal courts is the question of the legal cause standard applicable to employee negligence under Section 3 of the Act. It is an issue on which there is a conflict among the lower courts and an issue which should be resolved by this Court.

It is respectfully submitted that the Petition for a Writ of Certiorari to Review the Judgment of the Arizona Supreme Court denying the Petition for Review and the Judgment on the merits of the Arizona Court of Appeals should be granted.

Respectfully submitted this 29th day of July, 1968.

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Appendix A

In the Superior Court of the State of Arizona
in and for the County of Pima

No. 87099

Agnes L. Haines, *Plaintiff,*

vs.

Southern Pacific Company *Defendant.*

Filed Feb 17 1966

JUDGMENT

This matter coming on regularly to be heard on the 8th day of February, 1966, and the Plaintiff being present in person and by her counsel, Robert F. Miller, and the Defendant being represented by its counsel, Richard M. Bilby, each of the parties having presented their evidence; the matter having been submitted to the jury under the instructions from the Court on the 11th day of February, 1966; and the jury having rendered its verdict in favor of the Defendant Southern Pacific Company and against the Plaintiff, Agnes L. Haines.

Now Therefore, It is Hereby Ordered, Adjudged and Decreed:

That the Plaintiff take nothing by way of her complaint filed against the Defendant, and that the Defendant have judgment against the Plaintiff for its costs incurred herein.

It is Further Ordered, Adjudged and Decreed:

That the Plaintiff shall pay to the clerk of the Superior Court of the State of Arizona, in and for the County of Pima, the sum of Six hundred-seventy-two dollars ($672.00) for jury fees.

Done in open court this 16 day of February, 1966.

/s/ ROBERT O. ROYLSTON
Judge

Appendix B

In the Court of Appeals
State of Arizona
Division Two

2 CA — CIV 301

Agnes L. Haines, as surviving spouse and personal representative of Donald J. Haines, deceased,
Appellant,

vs.

Southern Pacific Company,
Appellee.

Filed Jan 17 1968

Miller and Pitt Tucson
By David J. Leonard, Esq.
Attorneys for Appellant

Boyle, Bilby, Thompson and Shoenhair
By Richard M. Bilby
Attorneys for Appellee

ORDER

The above entitled matter was duly submitted to the court. The court has this day rendered its opinion.

It is ordered that the opinion be filed by the clerk, and under the Rules of the Supreme Court, Rule 47(a), fifteen (15) days are allowed from this date to file a Motion for Rehearing.

It is further ordered that a copy of this order together with a copy of the opinion be sent to each party appearing

herein or the attorney for such party and Judge Robert O. Roylston.

James D. Hathaway, *Chief Judge*
/s/ JAMES D. HATHAWAY

Copies mailed as directed this
17th day of January, 1968.
/s/ ELIZABETH JEAN URWIN
Elizabeth Jean Urwin, *Clerk.*

In the Court of Appeals
State of Arizona
Division Two

2 CA — CIV 301

Agnes L. Haines, as surviving spouse and personal representative of Donald J. Haines, deceased,
Appellant,

vs.

Southern Pacific Company,
Appellee.

Filed Jan 17 1968

Appeal from the Superior Court of Pima County
Cause No. 87099
Honorable Robert O. Roylston, Judge
Affirmed

Miller and Pitt Tucson
By David J. Leonard, Esq.
Attorneys for Appellant

Boyle, Bilby, Thompson and Shoenhair Tucson
By Richard M. Bilby
Attorneys for Appellee

HATHAWAY, Chief Judge.

This case involved a wrongful death action brought under the Federal Employers Liability Act, 45 U.S.C. § 51, et seq., for the death of the plaintiff's decedent who was killed in the line of his duties while working for the defendant railroad. The issues of the defendant's negligence, the dece-

dent's contributory negligence, and damages were submitted to the jury. A verdict was returned for the defendant railroad and a judgment was entered thereon. The plaintiff's motion for a new trial was denied and this appeal followed. We must view the facts in the light most favorable to support that judgment.

The plaintiff is the widow of the decedent, Donald J. Haines, who met his death on the night of November 12, 1964, when the Southern Pacific Company freight train on which he was riding and acting as conductor was derailed near Bowie, Arizona. The decedent had 36 years of employment with the railroad and was 56 years old at the time of his death.

A rail failed and derailed the last 12 cars of the 89-car train, including the caboose, in which the decedent was riding. Expert testimony was submitted by both sides pertaining to the rail failure. The issue of the defendant's negligence was submitted to the jury upon this evidence. This appeal deals only with problems related to the issue of the decedent's contributory negligence.

The evidence established that prior to the derailment the train in which the decedent was working as conductor had been proceeding in an easterly direction toward Bowie, Arizona. At the same time, a local freight train was approaching Bowie from the north on another set of tracks, not a part of the main line. The decedent overheard the radio-telephone conversation between the conductor and the engineer on the local train. The decedent went to his own radio-telephone and, while standing in the aisle, he entered the conversation with the conductor and the engineer on the local freight train. While the decedent was thus talking on the phone, Mr. Hannah, the swing brakeman, was seated at the north bay window. Mr. Upshaw,

the flagman, was seated in the rear of the caboose. The conductor's chair on the north side of the caboose immediately behind the north bay window was not occupied. The radio-telephone on which the decedent was talking was located on a partition between the conductor's desk and the seat in the north bay window in which Mr. Upshaw was sitting. The conversation in which the decedent was engaged concerned a question by the local freight train as to whether the north leg of the Y at Bowie was clear. The decedent, in order to answer any questions concerning the north leg of the Y, had to look out the north side of the caboose. Since the radio-telephone had a ten-foot extension cord, the decedent could easily have seated himself at his desk in the conductor's chair and viewed the north leg of the Y from this position. However, the decedent chose to stand in the aisle for two or three minutes during the conversation and while viewing the north leg of the Y. There is no direct evidence whether the decedent was standing at the time of the derailment or whether he was securing himself by grasping the overhead grab-iron while standing in the aisle.

The decedent met his death as the result of slack action[1] caused by the derailment which tossed the decedent to the end of the caboose where he struck his head and died.

Mr. Hannah and Mr. Upshaw were both seated at the time of the derailment. Neither was thrown about nor injured in any way nor was there any damage to the interior of the caboose.

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1. Slack action results when there is an unanticipated quick change in maximum and minimum length of a train. The length of a train is variable because of a certain amount of free movement space within each coupling. Upon a sudden stop, as a derailment, the space within each coupling is quickly exhausted and the cars bunch together. The resultant slack action is particularly severe in the last car or the caboose. Slack action can occur at all speeds.

At the time of the derailment there was in effect Rule 2044 of the Safety Rules of the Southern Pacific Company passed for the protection of employees riding in moving equipment:

> "At all times when riding moving equipment, employees must be prepared for sudden or unexpected starting, stopping, lurch or jerk of engine, car, or train by maintaining firm hand and foot hold, by being braced and holding, or prepared to do so instantly, moving about only when necessary for the performances of duties."

The plaintiff, in its opening brief, presents two basic issues for review:

1. Was sufficient evidence presented of the decedent's contributory negligence from which the court could properly so instruct the jury?
2. Were the trial court's instructions on contributory negligence improper statements of the law under the F.E.L.A.?

The defendant, in its appellee's brief, objects to the plaintiff's attempts to put before this court issues concerning alleged errors in the trial court's instructions on contributory negligence that were not presented to the trial court. The plaintiff contends that the trial court erroneously instructed the jury as to the method of computing damages if they found the plaintiff's decedent to have been contributorily negligent. However, the record presents the plaintiff's only objections to the instructions on contributory negligence to be as follows:

> "The plaintiff objects to the defendant's requested instructions . . . for the reason and upon the grounds that the facts and evidence do not warrant an instruction on this subject. Reasonable persons under the provisions of the F.E.L.A. could not find that the decedent

contributed to his own demise. For that reason the instructions are erroneous.

"With reference to defendant's requested instruction No. 7 there is an additional objection in that the phrase 'in any degree no matter how small,' is improper because this is not the standard by which one measures contributory negligence in an F.E.L.A. case. Although this is the standard that measures the liability of the employer, it does not measure the contributory negligence of the decedent or the employee. There is a double standard[2] for determining negligence and its proximate cause, and it is not the same as to the employer and the employee. This instruction makes it the same, and for that reason it is erroneous."

Plaintiff's counsel attempts to call this court's attention to an informal practice in which objections to proposed instructions are brought to the court's attention. Plaintiff's counsel states in its reply brief:

---

2. The "double standard" question is explained in comment, *Legal Cause, Proximate Cause, and Comparative Negligence in the F.E.L.A.*, 18 Stan. L. Rev. 929, 930 (1966) as follows:

"Consider the case where an employee, injured while operating one of the railroad's locomotives in interstate commerce, sues his employer under the FELA. Each party's conduct was culpable, so that if the 'legal cause' connection between that conduct and the employee's injury is found, each was negligent. While neither party's conduct was the 'proximate cause' of the injury, as that term is understood in the common law of negligence, each party's conduct was within the 'simple causation' standard [in Rogers v. Missouri Pac. R.R., 352 U.S. 500, 507, 77 S.Ct. 443, 1 L.Ed. 2d 493 (1957), the Supreme Court defined the 'simple causation' standard as follows: '. . . whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit.'] that has been applied to determine a railroad's liability in FELA actions. Given this situation the railroad is liable, because its conduct was the simple cause of the injury. But is the employee to have his recovery diminished under section 3 of the FELA? The answer depends upon whether common-law proximate cause or simple causation is the legal cause test to be applied to an employee's conduct in suits under the act."

As noted later, we find it unnecessary to resolve this legal problem.

"At the close of the case, the court directed counsel into chambers to discuss proposed instructions and an informal discussion was had with the judge and counsel. The judge indicated his thinking on many of the proposed instructions and in a number of instances advised counsel what his ruling would be. These discussions were, for the most part, reported. However, there are a number of instances where there was discussion off the record as well as occasional levity in the colloquy of counsel and the court. . . .

"After the entire set of instructions was hashed over, the court indicated what would be given and what would be refused. He then indicated that the record could be made after the jury was instructed and had retired for the deliberations.

"The formal objections to the instructions were made with only the attorneys and the reporter present after the jury had retired to deliberate."

Plaintiff's counsel contends that he made the trial court aware of his various grounds for objection to the instructions on contributory negligence. However, we must respect the rights of the defendant to base his objection to the plaintiff's presentation of the issues on appeal upon Rule 51, which provides:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after arguments are completed. *No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.* Opportunity shall be given to

make the objection out of hearing of the jury." (Emphasis supplied) Rule 51, Rules of Civil Procedure, 16 A.R.S.

The defendant has not stipulated to what transpired in the alleged informal hearing in the trial court's chambers. Rather, the defendant relies upon the only objections to the instructions properly before this court, i.e., those contained in the record. We do not pass upon the propriety of the alleged informal procedure presented to us by the plaintiff. As an appellate court, however, we can take cognizance only of what is preserved to us in the record.

Having closely examined the instructions as a whole, we find no fundamental error. Therefore, we hold that plaintiff waived her objections to the instructions on contributory negligence except those objections of record, i.e., sufficiency of the evidence of contributory negligence and double standard of care in F.E.L.A. cases.

SUFFICIENCY OF EVIDENCE OF CONTRIBUTORY NEGLIGENCE

The Federal Employers Liability Act is the method by which an injured employee of a common carrier involved in interstate commerce seeks compensation for his damages. 45 U.S.C. § 51, et seq. Unlike local workmen's compensation statutes, the F.E.L.A. does not make an employer the insurer of its employees against injuries incurred while working. *Inman v. Baltimore and Ohio Railroad Co.*, 361 U.S. 138, 80 S.Ct. 242, 4 L.Ed.2d 198 (1959). Under the F.E.L.A. the basis for an employee's action against an employer is negligence on the part of the employer. However, the F.E.L.A. abolished all of the common law defenses which, prior thereto, had been available to the employer.

Tracy v. Terminal R. Ass'n of St. Louis, 170 F.2d 635 (8th Cir. 1948). The issue of contributory negligence may be considered only after it has been found that the injury complained of resulted in whole or in part from the negligence of the defendant. Terminal Railroad Association v. Howell, 165 F.2d 135 (8th Cir. 1948). Thereafter, the contributory negligence of the plaintiff, if any, is determined and considered solely for the diminution of damages. 45 U.S.C. § 53.[3]

In her contention that there was insufficient evidence of contributory negligence to be submitted to the jury, the plaintiff cites several Arizona cases. The defendant, however, correctly argues that Arizona law should not be applied to this issue in an F.E.L.A. case. The United States Supreme Court has already put this issue at rest in Brady v. Southern Railway Co., 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239 (1943), where the court said at page 479:

> "In Employers' Liability cases, this question must be determined by this court finally. Through the supremacy clause of the Constitution, Art. VI, we are charged with assuring the act's authority in state courts. Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states."

The weight of the evidence must be more than a scintilla, Brady v. Southern Railway Co., supra, but a string of cir-

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3. 45 U.S.C. § 53:
"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. . . ."

cumstances may be enough for the submission of the issue of contributory negligence to the jury. Daulton v. Southern Pacific Co., 237 F.2d 710 (9th Cir. 1956); and, Gans v. Baltimore and Ohio Railroad Co., 319 F.2d 802 (3d Cir. 1963).

In determining this issue every case must ultimately rest upon its own individual facts, Brady v. Southern Railway Co., supra; therefore, a short reappraisal of the evidence is here necessary. The decedent, while talking on the radio-telephone, could either have seated himself safely in the conductor's chair or have secured himself upon the overhead grab-iron. Either of these alternatives would have been in accordance with Safety Rule 2044. After the derailment the interior of the caboose appeared clean and intact and free of loose debris. Neither Mr. Hannah nor Mr. Upshaw, who were seated at the time of the derailment, were tossed about or injured in any way. We conclude that from viewing the evidence submitted there were sufficient facts to justify submission of the issue of contributory negligence to the jury. See Miller v. New York Central Railroad Co., 239 F.2d 10 (7th Cir. 1956), a case factually very similar to the instant case and reaching the same conclusion on the issue of contributory negligence. *Cf.*, Mumma v. Reading Co., 247 F.Supp. 252 (E.D. Pa. 1965); and, Schulz v. Pennsylvania Railroad Co., 350 U.S. 523, 76 S.Ct. 608, 100 L.Ed. 668 (1956).

EFFECT OF JURY'S VERDICT FOR DEFENDANT ON PLAINTIFF'S DOUBLE STANDARD OBJECTION

The defendant argues that plaintiff's objections (based on the double standard argument) to the instructions on contributory negligence are necessarily of no moment because a verdict by the jury in the defendant's favor con-

clusively means that the railroad is guilty of no negligence. This argument is based upon the above cited 45 U.S.C. § 53, which abolished contributory negligence as a defense and states that contributory negligence may only be considered in the diminution of damages. Therefore, if the jury has been correctly instructed upon the effect of the F.E.L.A. on the defense of contributory negligence, a verdict for the defendant can only mean that it either found the defendant guilty of no negligence or that it found the plaintiff's negligence to be the sole proximate cause of the plaintiff's damages.

In the instant case the jury was correctly instructed upon the effect of contributory negligence at the plaintiff's own request.[4] The jury was also instructed, without objection, on the issue of sole proximate cause.[5] The jury was correctly instructed on the issues of negligence and contributory negligence and that under the F.E.L.A. contributory negligence only mitigates damages. Therefore, if the

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4. Plaintiff's requested instruction No. 7 was given verbatim by the trial court:

"Contributory negligence, if any, on the part of the decedent does not bar recovery by the plaintiff against the defendant, Southern Pacific Company, but the total amount of damages to which the plaintiff otherwise would be entitled shall be reduced by you in proportion to the amount of negligence attributable to the decedent."

5. Defendant's requested instruction No. 6 was given verbatim by the trial court:

"It was the continuing duty of the deceased to exercise ordinary care for his own safety.

"If he failed in such duty, he himself was negligent. If his negligence was the sole proximate cause of his injury, then he may not recover.

"If his conduct amounted to contributory negligence as to any injury suffered, and if you should find that the defendant is liable for such injury, then, in fixing the damages to be awarded plaintiff for that injury, a proportionate reduction must be made because of such contributory negligence in accordance with my instructions."

defendant caused none of the damage, or if the plaintiff's decedent was the sole cause of his injuries the defendant cannot be held liable. It follows that if any error in the instructions on contributory negligence, as to a single or double standard as argued by the plaintiff, existed it could only be harmless error in the light of the jury's verdict for the defendant. Tracy v. Terminal Railroad Association of St. Louis, supra; Gans v. Baltimore and Ohio Railroad Co., supra; and, Rogers v. Southern Pacific Co., 172 C.A.2d 493, 342 P.2d 258 (1959).

ASSUMPTION OF RISK

The plaintiff contends that the admission in evidence of Safety Rule 2044 necessarily inserted in the case the issue of assumption of risk. She correctly states that under the F.E.L.A. the defense of assumption of risk has been totally abolished. However, where the evidence necessary to establish contributory negligence might also be used to establish assumption of risk, the defendant will not be precluded from offering such evidence.

> "The defendant may not be denied its partial defense of contributory negligence merely because the same evidence would be pertinent to prove assumption of risk." Murray v. New York, New Haven and Hartford Railroad Co., 255 F.2d 42, 44 (2d Cir. 1958).

See also Gowans v. Pennsylvania Railroad Co., 299 F.2d 431 (6th Cir. 1962); and, Dilley v. Chesapeake and Ohio Railway Co., 327 F.2d 249 (6th Cir. 1964).

Safety Rule 2044 was properly admitted in evidence as circumstantial evidence of decedent's contributory negligence. Murray v. New York, New Haven and Hartford Railroad Co., supra; and, Miller v. New York Central Rd. Co., 239 F.2d 10 (7th Cir. 1956). The defendant neither

relied upon nor argued assumption of risk and there was no instruction on it. We can find no error based on this contention.

Affirmed.

JAMES D. HATHAWAY, Chief Judge

CONCURRING:

JOHN F. MOLLY, Judge
HERBERT F. KRUCKER, Judge

Appendix C

In the Court of Appeals
State of Arizona
Division Two

2 CA — CIV 301

Agnes L. Haines, as surviving spouse and personal representative of Donald J. Haines, deceased,
Appellant,

vs.

Southern Pacific Company,
Appellee.

Filed Mar 21 1968

ORDER

It Is Ordered that the motion for rehearing be, and it hereby is, denied.

Dated: March 21, 1968.

/s/ James D. Hathaway
James D. Hathaway
Chief Judge.

/s/ John F. Molloy,
John F. Molloy,
Judge.

/s/ Herbert F. Krucker,
Herbert F. Krucker,
Judge.

Copy to:

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Tucson, Arizona

West Publishing Company

Appendix D

Supreme Court
State of Arizona
Phoenix

May 1, 1968

No. 9276-PR (Supreme Court)
No. 2CA CIV-301 (Court of Appeals)

Agnes L. Haines, as surviving spouse and personal representative of Donald J. Haines, deceased,
Appellant,

vs.

Southern Pacific Company,
Appellee.

The following action was taken by the Supreme Court of the State of Arizona on Tuesday, April 30, 1968, in regard to the above-entitled cause:

"ORDER: Petition for Review = DENIED"

SYLVIA HAWKINSON,
Clerk

By /s/ LUCILE BROOKS
Assistant Clerk

To—

Miller & Pitt
201 N. Stone Avenue
Tucson, Arizona 85701

Boyle, Bilby, Thompson & Shoenhair
907 Valley National Building
Tucson, Arizona

Court of Appeals, Division No. 2
415 W. Congress
Tucson, Arizona

Appendix E

In the Superior Court of the State of Arizona in and for the County of Pima

No. 87099

Agnes L. Haines, as surviving spouse and personal representative of Donald J. Haines, deceased,

Plaintiff,

vs.

Southern Pacific Company,

Defendant.

JUDGMENT AND ORDER DENYING PLAINTIFF'S MOTION FOR NEW TRIAL

The plaintiff having filed her motion on February 15th, 1966, and oral argument having been heard before the Court, and the Court being fully advised in the premises:

It Is Hereby Ordered, Adjudged and Decreed that the plaintiff's Motion for New Trial shall be, and hereby is, denied.

Done in Open Court this 26th day of May, 1966.

ROBERT O. ROYLSTON
Judge of the Superior Court

Approved as to Form;
this 26th day of May, 1966:

MILLER & PITT
By /s/ ROBERT F. MILLER
Robert F. Miller
Attorneys for Plaintiff

Appendix F

APPENDIX

Defendant's Requested Instruction No. 4

A death is proximately caused by an act or omission whenever it appears that the act or omission played any part, no matter how small, in actually bringing about or causing the death. So if you find from the evidence that any negligence on the part of the defendant Southern Pacific Company contributed in any way or manner towards the death of Donald Haines, you may find that death was proximately caused by defendant's act or omission. (T. 462)

Defendant's Requested Instruction No. 6

It was the continuing duty of the deceased to exercise ordinary care for his own safety. If he failed in such duty, he himself was negligent. If his negligence was the sole proximate cause of his injury, then the plaintiff may not recover.

If his conduct amounted to contributory negligence as to the death, and if you should find that the defendant is liable for the death, then in fixing the damages to be awarded the plaintiff, a proportionate reduction must be made because of such contributory negligence in accordance with these instructions. (T. 464)

Defendant's Requested Instruction No. 7

A person is guilty of contributory negligence if he himself is negligent, and his negligence concurring with the negligence of another or of others, contributes in any degree, no matter how small, in proximately causing the death. (T. 464)

Plaintiff's Requested Instruction No. 7

Contributory negligence, if any, on the part of the decedent does not bar a recovery by the plaintiff against the

defendant Southern Pacific Company, but the total amount of damages to which the plaintiff otherwise would be entitled shall be reduced by you in proportion to the amount of negligence attributable to the decedent. (T. 464-5)

Defendant's Requested Instruction No. 8

Thus, if you find that the decedent's death was proximately caused by a combination of contributory negligence of the decedent and the negligence of the defendant employer, you shall determine the amount of damages to be awarded by you as follows:

First, Determine the total amount of damages to which the plaintiff would be entitled under the Court's instructions if decedent had not been guilty of contributory negligence;

Second, Determine what percentage of the total combined negligence of the defendant employer and the decedent which proximately caused the death consisted of the decedent's negligence; and

Third, Then reduce the total amount of plaintiff's damages by that percentage. (T. 465)

Defendant's Requested Instruction No. 9

For the purpose only of illustrating how to apply the law that requires a proportional reduction of damages in the event of a finding that both the defendant and the deceased employee were guilty of negligence which contributed as a proximate cause to the deceased's death, let us assume that a jury in a case similar to this one has made such findings.

Its next step would be to determine the amount of damages to which the plaintiff would be entitled under the Court's instructions if the factor of contributory negligence were not present and the other necessary elements of liability were present. Let us call that amount "X dollars."

The jury next would be required to view as a combined effect the negligence of the defendant and the negligence of

the deceased which were proximate causes of the death. Then with that combined negligence in mind, the jury would determine what portion of it, in fraction or percentage, consisted of the deceased employee's own conduct.

If in the jury's judgment one-half of such combined negligence was the deceased employee's, then it would award plaintiff only half of X dollars. If two-thirds of such negligence was the deceased employee's, then the jury would award plaintiff only one-third of X dollars. If one-third of such negligence was the deceased employee's, then the jury would award plaintiff two-thirds of X dollars.

You will bear in mind that in giving you this instruction, to be considered only in the event that your findings should make it appropriate, I do not mean to convey any suggestion whatsoever as to what your verdict should be, whether for the plaintiff or the defendant, or if for the plaintiff in what amount. (T. 465-7)

Defendant's Requested Instruction No. 10

If under the Court's instructions you should find that the plaintiff is entitled to damages, and you will have found that Donald Haines, the deceased employee, was not guilty of contributory negligence, you will award plaintiff such sum as, under all the circumstances of the case, will be just compensation for the pecuniary loss suffered by the surviving spouse which loss has resulted and is reasonably certain to result from the death of said employee. You shortly will be advised how to measure such loss.

If you will have found that said Donald Haines, deceased, was guilty of contributory negligence, then before you diminish the damages in proportion to the amount of negligence attributable to him, as I have instructed you, you will arrive at the amount of damages to which plaintiff would

have been entitled had it not been for such contributory negligence.

The measure of the pecuniary loss to which I have referred insofar as it relates to the future is the present cash value of the future benefits of which the surviving spouse has been deprived by the death, and which are capable of measurement by a pecuniary standard. (T. 467-8)

Res Ipsa Loquitur

Ordinarily, the mere happening of an accident will not support a finding that there was negligence on the part of any party. This is not always true, however, and the plaintiff in this case relies on an exception to the general rule. The exception is known by lawyers as "res ipsa loquitur." These Latin words mean, "the thing itself speaks."

The rule of res ipsa loquitur may be used by you in this case if you find that the following four conditions existed with respect to the accident involved:

First, the accident must be of a kind which ordinarily does not occur unless someone has been negligent.

Second, it must have been caused by an agency or instrumentality within the exclusive control of the defendant.

Third, it must not have been due to any voluntary action on the part of the deceased.

Fourth, the plaintiff must not be in a position to show the particular circumstances which caused the offending agency or instrumentality to operate in this particular manner.

Now if you find that these four conditions existed you are permitted, but not required, to infer that the proximate cause of the accident in question was some negligent conduct on the part of the defendant. That inference, if it be drawn by you, is itself a form of evidence. And if no other evidence exists tending to overthrow it, or if the inference either alone or with any other evidence supporting it pre-

ponderates over contrary evidence, then you may find that the defendant was negligent. Therefore, if the inference of negligence is drawn by you from the happening of the accident in the manner that it occurred, you should weigh any evidence tending to overcome the inference, bearing in mind that in such situation it is incumbent upon the defendant to rebut the inference by showing that it did in fact exercise ordinary care and diligence, or that the accident occurred without being proximately caused by any failure of duty on its part.

The plaintiff's burden of proving negligence on the part of the defendant by a preponderance of evidence is not changed by the rule just mentioned, but the plaintiff may be aided in establishing her case by the inference you are permitted to draw.

In order to find the defendant negligent under the res ipsa loquitur rule, the inference of negligence, if it is drawn by you, and any other evidence in the case which supports it, must have greater weight and more convincing force in your minds than the opposing explanation offered by the defendant to the effect that it was not negligent.

If such a preponderance in plaintiff's favor exists, then the plaintiff has established negligence on the part of the defendant, even though she cannot show specifically how the accident occurred. (T. 456-8)

Appendix G

45 U.S.C. sec. 51

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

45 U.S.C. sec. 53

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provi-

sions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.

45 U.S.C. sec. 54

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

45 U.S.C. sec. 55

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any

action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought. Apr. 22, 1908, c. 149, § 5, 35 Stat. 66.

Office-Supreme Court, U.S.
FILED
AUG 21 1968
JOHN F. DAVIS, CLERK

In the Supreme Court

of the

United States

OCTOBER TERM, 1968

No. 350

AGNES L. HAINES, as surviving spouse and personal representative of DONALD J. HAINES, deceased,

Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,

Respondent,

On Petition for Writ of Certiorari to the Supreme Court of the State of Arizona

Brief of Respondent Southern Pacific Company In Opposition to the Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

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In the Supreme Court

of the

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OCTOBER TERM, 1968

No. 350

AGNES L. HAINES, as surviving spouse and personal representative of DONALD J. HAINES, deceased,

Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,

Respondent,

On Petition for Writ of Certiorari to the Supreme Court of the State of Arizona

Brief of Respondent Southern Pacific Company In Opposition to the Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

JUDGMENT SOUGHT TO BE REVIEWED

This case was tried to a jury which returned a verdict in favor of the Defendant Southern Pacific Company on the 11th day of February, 1966. Thereafter, on the 26th day of May, 1966, the Petitioner's Motion for New Trial was denied. Petitioner thereupon appealed to the Arizona Court of Appeals, Division Two, which, by written opinion entered on January 17, 1968, affirmed the jury's verdict. [7 Ariz. App. 65, 436 P.2d 159] The Court of Appeals

subsequently denied the Petitioner's Petition for Re-Hearing on March 21, 1968. Petitioner then filed a Petition for Review with the Supreme Court of Arizona which was denied on April 30, 1968, by that Court.

STATEMENT OF FACTS

The Petitioner (Plaintiff) has omitted from her statement of the case most all of the facts upon which the jury based its verdict for the Respondent (Defendant) Southern Pacific Company and misstated those not omitted. This necessitates our statement.

The Plaintiff's decedent's death was caused by slack action resulting from a derailment of the train in which he was riding. The derailment was caused by a broken rail.

The two major issues which were tried to the jury were: (a) What caused the rail to break; and (b) Whether either the Defendant or the Plaintiff was guilty of negligence.

It was Plaintiff's contention that the rail broke because of improper inspection by the Defendant which permitted a bolt to become loose in the joint area thereby causing the cracks in the rail which led to the breaking of the rail and the derailment. It was Defendant's contention that the rail was regularly inspected and that the breaking was not the result of a failure to inspect or any negligence on the part of the Defendant. Each of the parties submitted evidence in support of their respective theories. Defendant also contended that the death of Plaintiff's decedent was caused solely by his own negligence.

The Plaintiff employed an expert, Fred H. Cady, who came to Tucson to inspect the rail. He testified twice, once at a previous trial of this cause and again at the

present trial. [Ab. 29,40] At both of these trials, he testified that the derailment was caused by a broken rail resulting from a loose bolt in the joint area of the broken rail. It was his theory that the bolt had been loose for some substantial period of time prior to the derailment. [Tr. 195] The Defendant's expert contested this theory and testified that in his opinion the bolt became loose as a result of the accident and was not the cause thereof. [Tr. 365]

Both experts based their testimony upon inspections of the broken rail and certain photographs taken at the scene of the accident. [Tr. 184-86, 331-32]

The Defendant's expert testified that normal wear and tear on the rail caused the bolt in question to exert pressure on the web of the rail thereby causing cracks to develop. [Tr. 365] These cracks worked their way through to the top of the rail resulting in the broken rail which in turn caused the derailment. [Tr. 250,353]

The Defendant produced its inspection records of this rail and introduced testimony concerning rail inspection practices in the area of the derailment. [Tr. 136-38, 237-40]

This uncontradicted evidence showed that from a metallurgical standpoint, the Ultrasonic and Detector Cars should inspect the rail once or twice a year. [Tr. 334] In this case such semi-annual inspections were carried out prior to the derailment. The latest inspections prior to the derailment of November 14, 1964, were on September 9, 1964 (Ultrasonic Car) and July 12, 1964 (Detector Car). These inspections did not discover any defects in the rail in question. [Tr. 161, Pl. Exh. 16]

On the issue of the Plaintiff's decedent's negligence, the evidence showed that prior to the derailment, the train in which Mr. Haines was working as conductor, had

been proceeding in an easterly direction toward Bowie, Arizona. [Tr. 9] At the same time, a local freight train was approaching Bowie from the north on another set of tracks, not a part of the main line. [Tr. 5,6] Mr. Haines, while seated in the caboose on his train, overheard a radio-telephone conversation between the conductor and engineer on the local freight train. [Tr. 22,32] He voluntarily got out of his seat by the south bay window and broke into their conversation. [Tr. 22] At the time of Mr. Haines' interruption, the conductor on the local freight train was asking his engineer whether the north leg of the Y at Bowie was clear. [Tr. 37]

While Mr. Haines was talking on the phone, Mr. Hannah, the swing brakeman, was seated at the north bay window; Mr. Upshaw, the flagman, was seated in the rear of the caboose; and the conductor's chair on the north side of the caboose immediately behind the north bay window was not occupied. [Tr. 30,33,44] As Defendant's Exhibit F shows the radio-telephone being used by Mr. Haines was located on the partition between the conductor's desk and the seat in the north bay window occupied by Mr. Upshaw.

To answer any questions concerning the north leg of the Y, Mr. Haines would have to look out the north side of the caboose. [Tr. 10,38] This he could do while still holding the phone by either standing in the aisle and looking out the north bay window or by sitting down in the conductor's chair and looking out the conductor's window. [Tr. 38,53; Defendant Exh.E, Plaintiff Exh.8] The radio-telephone being used by Mr. Haines had a ten foot extension cord to enable the conductor to use it while seated at his desk. [Tr. 21,53] Mr. Haines stood in the aisle of the caboose for approximately two to three minutes prior to the derailment. [Tr. 23,31]

There was in effect at the time of the derailment Rule 2044 of the safety rules of the Southern Pacific Company, for the protection of employees riding in moving equipment such as was Mr. Haines, which rule provided:

> "At all times when riding moving equipment employees must be prepared for sudden or unexpected starting, stopping, lurch or jerk of engine, car, or train by maintaining firm hand and foot hold, by being braced and holding, or prepared to do so instantly, moving about only when necessary for the performances of duties." [Defendant Exh.C]

The evidence showed that slack action can and does occur at all speeds. [Tr. 101] The Assistant Superintendent testified:

> "One is likely to have slack action any time and the people that are riding on the train are supposed to be protecting themselves and expecting slack action at any time." [Tr. 102]

Because of Mr. Haines' failure to either sit down in the conductor's chair or properly brace himself while standing in the aisle, the slack action resulting from the derailment threw him to the end of the caboose. [Tr. 34,45] Neither Mr. Hannah nor Mr. Upshaw, who were seated in the same caboose at the time of the derailment, were thrown about or injured, nor was there any damage done to the interior of the caboose. [Tr. 40,53,88]

In addition to Plaintiff's Instruction No. 7 defining contributory negligence, the Court also gave Defendant's Instruction No. 12 setting forth the method by which the jury was to approach this case. Plaintiff's only objection to Defendant's Requested Instructions No. 6, 8, 9, 10, 11 and 12 was that the evidence did not warrant an instruction on contributory negligence. [Tr. 479]

Furthermore, until the Plaintiff's counsel filed their Opening Brief in the Court of Appeals, they had never objected to the specific language of these Instructions nor did they raise any question about these Instructions in their Motion for a New Trial.

REASONS FOR DENYING THE WRIT

As was true of all the contentions raised by the Petitioner in the Court of Appeals in the State of Arizona, the present Petition for Writ of Certiorari deals only with problems related to the issue of contributory negligence.[1]

In light of the law and the Court's instructions to the jury on the matter of negligence and causation to which Plaintiff entered no objection, the matters raised by Petitioner are completely irrelevant to the jury verdict and its affirmation on appeal.

Respondent directs the Court's attention to Defendant's Instruction No. 12, which correctly instructed the jury as to its function in deciding this case. Plaintiff admitted that the instruction was legally correct and entered no objection to it other than it contained a reference to contributory negligence as to which Plaintiff contended there was not sufficient evidence.[2]

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[1] While the Texas Court of Civil Appeal in *Missouri-Kansas-Texas R.R. v. Shelton*, 383 S.W.2d 842, (Tex.Civ.App. 1964) Cert. denied, 382 U.S. 845 (1965), by way of dictum, has held in favor of a double standard of causation, the overwhelming authority in all other Courts is to the contrary. *Ganotis v. New York Central Railway Co.*, 342 F.2d 767 (6 Cir. 1965); *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820 (5 Cir. 1965); *Mumma v. Reading Company*, 247 F.Supp. 252 (D.C.E.D. Penn. 1965); *Caplinger v. Northern Pacific Terminal*, 418 P.2d 34 (1966 Supreme Court of Ore.); and *Daulton v. Southern Pacific Co.*, 237 F.2d 710 (9 Cir. 1956).

[2] "Mr. Miller: Will you harken to my argument that although it is *legally correct* that it is just confusing to a jury because of its intricacies." [Tr. 412] (emphasis supplied)

Pursuant to this instruction, the jury determined by its verdict, on the basis of conflicting evidence, that there was no negligence on the part of the Defendant which contributed in any degree, no matter how small, to the death of Plaintiff's decedent. In light of that finding any alleged error on the issue of contributory negligence was harmless. *Rogers v. Southern Pacific Co.*, 172 C.A.2d 493, 342 P.2d 258, 261 (1957); and *Tracy v. Terminal R. Ass'n of St. Louis*, 170 F.2d 635 (8 Cir. 1948).

The language of the Court in *Rogers v. Southern Pacific Co., supra*, deals specifically with this matter when it held:

> "In order to find its verdict for defendant under these instructions, the jury must have found that defendant was guilty of no negligence which contributed as a proximate cause to decedent's death. *Under such circumstances any error in the instructions or the admission of evidence relating solely to the decedent's contributory negligence can not have been prejudicial to appellant.*" (emphasis supplied)

The validity of the Respondent's position with regard to this matter was recognized by the Petitioner's counsel in their Reply Brief filed in the Court of Appeals, State of Arizona: (p.2)

> "Defendant contends that a defense verdict in an FELA case could only be the result of a jury finding of no negligence on the part of the defendant, since contributory negligence only diminishes the award and does not bar recovery. *Defendant's logic would be unassailable if the jury were properly instructed that contributory negligence only diminishes the award.* However, the jury was not so instructed. . . ." (emphasis supplied)[3]

[3] Of course, we contend that even if there were error in the contributory negligence instructions (which we deny) that could have no bearing on the jury verdict.

It is inconceivable to Respondent that counsel for Plaintiff would claim that the jury was not properly instructed in light of their own Requested Instruction No. 7 and Defendant Southern Pacific Company's Instruction No. 12.[4]

45 U.S.C. §53, which is set out on pages 26-27 of the Petitioner's Appendix G provides that:

> ". . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: . . ."

Plaintiff's own Requested Instruction No. 7 provided as follows:

> "Contributory negligence, if any, on the part of the decedent does not bar a recovery by the plaintiff against the defendant Southern Pacific Company, but the total amount of damages to which the plaintiff otherwise would be entitled shall be reduced by you in proportion to the amount of negligence attributable to the decedent."

The most cursory reading of 45 U.S.C. §53 and Plaintiff's Requested Instruction No. 7 indicates the correctness of the instruction under the law and establishes beyond question that this jury was properly instructed that contributory negligence only diminishes the award. Therefore, to quote Plaintiff's counsel: ". . . Defendant's logic (is) unassailable."

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[4] Counsel's failure to raise any of the present contentions with respect to the language of the various contributory negligence instructions is compounded by his failure in the trial court to offer any instructions on his own concerning the effect of contributory negligence on the amount of damages, if any, to be awarded Plaintiff. Such a failure constitutes a waiver of any objection to the Defendant's instructions on the point. *Miller v. New York Central Railway Co.*, 239 F.2d 10 (7 Cir. 1956).

In the present posture of this case there is no important question of Federal law properly before the Court. If the jury had returned a meager verdict indicating that it had found both parties guilty of negligence which in some manner contributed to the Plaintiff's decedent's death, then the question of a double or single standard might conceivably present such a question of interpretation of Federal law. However, this jury did not so find and its verdict conclusively establishes that the defendant Railroad was free from any negligence which contributed in whole or in part to the death of Plaintiff's decedent. This being the case, Petitioner has failed to present the Court with a record upon which to make any decision concerning the standard of causation applicable to contributory negligence in an FELA case.

DID EVIDENCE OF PETITIONER'S NEGLIGENCE PRESENT A JURY QUESTION?

> "In Passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given . . . ." *Webb v. Illinois C.R. Co.*, 352 U.S. 512, 1 L.Ed.2d 503, 505 (1957).

The jury was instructed, without any objection by Petitioner's counsel, that it was permitted:

> ". . . to draw from the facts which you find have been proved such inferences as seem justified in light of your experience. . . ." [Tr. 450]

The most justifiable inference to be drawn from the proven facts was that had Petitioner's decedent seated himself in the available seats (which would still allow him to look out the windows to the north), or properly braced himself while standing in the aisle, he would not have been thrown to his death by the slack action of the train.

The rule of an Appellate Court in reviewing the sufficiency of the evidence was established by this Court in *Basham v. Pennsylvania R. Co.*, 372 U.S. 699, 10 L.Ed. 2d 80, 82 (1963) as follows:

> ". . . but where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or discharge whatever facts are inconsistent with its conclusions, and the Appellate Court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is not reasonable."

Here, the jury had such a basis and under Amendment VII to the Constitution of the United States, the trial court was required to submit this issue to the jury.

Plaintiff's reliance upon *Jesionowski v. Boston & Maine Railroad*, 329 U.S. 452, 91 L.Ed. 416 (1947) and *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 87 L.Ed. 610 (1943) is not justified under the facts of this case. Unlike *Jesionowski* the death in this case resulted from slack action against which Plaintiff's decedent could, and should, have protected himself. *Herdman v. Pennsylvania R. Co.*, 352 U.S. 518, 1 L.Ed.2d 508 (1957). Furthermore, the uncontradicted evidence in this case was that slack action is not an unusual or extraordinary occurrence. [Tr. 102]

Petitioner's allegations concerning Rule 2044 are without any foundation in the record. The evidence was uncontradicted as to the duty to be on the alert for slack action on a moving train. Furthermore, Petitioner neither proved nor made any offer to prove that Rule 2044 was customarily violated. To the contrary, the only evidence on this point was that anyone using the phone in such a manner as to violate this rule was promptly told to sit down. [Tr. 109]

The negligence of the Defendant Southern Pacific Company that was alleged and sought to be proved by Plaintiff was its care and inspection of the broken rail. This question was thoroughly covered by both Plaintiff and Defendant with expert testimony and otherwise and the jury was instructed on res ipsa loquitur. The issue thus joined was resolved by the jury in the Defendant's favor.

CONCLUSION

The jury in this case was presented with evidence supporting two conflicting theories as to why this accident occurred and was given admittedly proper instructions as to the Defendant Railroad's duties, including an instruction on res ipsa loquitur. Based upon this evidence and these instructions, it then returned a verdict holding that the Defendant Southern Pacific Company was not guilty of any negligence which in any degree, no matter how small, caused the death of Petitioner's decedent.

The jury having found that there was no negligence on the part of the Defendant, this is not a case in which the questions concerning contributory negligence posed by Petitioner could legitimately be answered or decided. Had the jury returned a verdict in some amount for Petitioner, then such an issue might conceivably be presented. However, such is not the case and Respondent therefore requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted this 20th day of August, 1968.

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APPENDIX

Appendix A

DEFENDANT'S REQUESTED INSTRUCTION No. 3

A continuous duty exists on the part of an employer, such as the defendant Southern Pacific Company in this case, to use ordinary care in furnishing its employees with a reasonably safe place within which to work. The amount of caution required by that duty varies in direct proportion to the dangers known to be involved in the work.

To put the matter in another way, the amount of caution required of a railroad company, in the exercise of ordinary care, to furnish its employees a reasonably safe place within which to work, increases or decreases as do the dangers known to exist or that reasonably should be apprehended.

In the absence of knowledge or notice to the contrary an employee may assume that the employer has exercised ordinary care in furnishing a reasonably safe place within which to work, and he may rely and act on that assumption.

DEFENDANT'S REQUESTED INSTRUCTION No. 4

A death is proximately caused by an act or omission whenever it appears that the act or omission played any part, no matter how small, in actually bringing about or causing the injury or death. So if you find from the evidence that any negligence on the part of the defendant Southern Pacific Company contributed in any way or manner toward the death of Donald Haines you may find that death was proximately caused by defendant's act or omission.

DEFENDANT'S REQUESTED INSTRUCTION No. 12

The issues to be determined by you in this case are these:

First: Was the defendant employer negligent?

If your answer to that question is "No," you will return a verdict for that defendant; but if your answer is "Yes," you have a second issue to determine, namely:

Did that negligence contribute in any way or manner toward the death of the decedent?

If your answer to that question is "No," plaintiff is not entitled to recover, but if your answer is "Yes," then you must determine a third question:

Was the decedent negligent?

If you find that the decedent was not, after having found in the plaintiff's favor on the other two issues, you then must fix the amount of plaintiff's damages and return a verdict in his favor.

If you find that the decedent was negligent, you then must determine a fourth issue, namely:

Did that negligence contribute as a proximate cause of decedent's death?

If you should find that it did not, and you previously have found that the defendant employer was guilty of negligence which contributed to decedent's death, you then must fix the amount of plaintiff's damages and return a verdict in his favor.

But if your answer to the fourth question is "Yes," thus finding that the decedent was guilty of contributory negligence, you then must follow the law and procedure for arriving at damages and diminishing the same in proportion to the amount of negligence attributable to the decedent.

This you will do in accordance with my instructions on such matters.

COURT'S INSTRUCTION ON INFERENCES

You are to consider only the evidence in the case, but in your consideration of the evidence you are not limited to the bare statements of the witnesses. On the contrary, you are permitted to draw from the facts which you find have been proved such inferences as seem justified in the light of your experience. An inference is a deduction or conclusion which reason and common sense lead the jury to draw from the facts which have been proved.